IN THE

Supreme Court of the United States

NO. 547 OF OCTOBER TERM, 1920.

ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of JOHN E. SCHMIDT, Petitioner,

vs.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation Under the Laws of the State of Pennsylvania, Respondent.

On Writ of Certiorari to the Superior Court of the State of Pennsylvania.

BRIEF OF RESPONDENT.

GEORGE SUTHERLAND,
Southern Bldg.,
Washington, D. C.,
Attorney for Respondent.

JOHN C. SLACK,
O. S. RICHARDSON,
W. D. N. ROGERS,
518 Fourth Ave.,
Pittsburgh, Pa.
Of Counsel.

(27,904)

Smith Bros. Co. Inc., Legal Printers, 407-409 Grant Street, Pittsburgh, Pa.

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Argument.

We conceive that the most cogent argument on behalf of the Respondent is contained in the opinion of Judge Linn, on page 19 of the Record. We desire, however, to submit some considerations which appeal to us as being important in the determination of the question involved, for there is but one real question, i. e., whether the Respondent was justified in paying the proceeds of the policy to the beneficiary named therein in view of the fact that the assured was a bankrupt at the time of his death, of which fact the Respondent was ignorant.

We concede that had the Trustee in bankruptcy obtained possession of the policy in the lifetime of the insured, notified the Respondent prior to the insured's death that he desired to change the beneficiary so that the policy should be payable to the estate of the insured, obtained the Respondent's assent thereto and, thereafter, and before the death of the assured, had surrendered the policy and demanded its surrender value, the Respondent would have been obliged to pay him the surrender value of the policy.

But, in point of fact, no single one of these things happened, nor did the Respondent have any knowledge of any claim on the part of the Trustee until a year after it had paid the face of the policy to the insured's widow, the beneficiary named therein.

And, primarily, it does not appear that even the bankrupt himself ever had possession of the policy. The widow had an insurable interest in her husband's life and *con constat* that she took out the policy herself and paid the premiums on it during the ten years it was in force, unless the contrary is made to appear, and on this point the Record is silent. Of course, in such circumstances, the Trustee would have had no right either to the policy or any portion of the proceeds. We think, therefore, that it was primarily incumbent on the Petitioner to establish that the bankrupt was in possession of the policy at the time of the filing of the petition in bankruptcy, and having failed to do so he is wholly without standing to make any sort of demand on the Respondent.

Even assuming that the policy was in possession of the bankrupt the Petitioner is wholly without any right to recover in this action. As stated by the court below the question here involved is not an open one, having been decided by the Court of Appeals for the Third Circuit in another action brought by this Petitioner, all the circumstances being identical, except that in the case cited the Petitioner demanded the entire proceeds of the policy, whereas he here claims only the surrender value.

> *Frederick, Trustee vs. Metropolitan Life Insurance Company*, 239 Federal Reporter, 125.

In that case a petition for a certiorari was denied by this Court (243 U. S., 646). Under the reasoning of the Court in the Metropolitan case, it would be wholly immaterial whether the sum claimed be the whole proceeds of the policy or only its surrender value.

We do not consider any of the cases cited by counsel for the petitioner as applicable to the facts here involved. Surely, the Petitioner could, in the lifetime of the bankrupt, have exercised any right which the bankrupt himself might have exercised. But having failed to take any action whatever the rights of the parties became fixed upon the death of the assured, and the Respondent did the only thing it possibly could have done when it paid the proceeds to the person to whom it was contractually liable, having no knowledge whatever of any adverse claim and being in ignorance even of the fact that the proceeding in bankruptcy was pending.

Counsel for the Petitioner stresses the fact that the Petitioner did not learn of the existence of the policy in question until some time after the death of the bankrupt and payment to the designated beneficiary, for the reason that the policy was not included in the bankrupt's schedules. It would seem to require no extended argument to establish that we are not here concerned with the failure of the bankrupt to include all his assets in his schedules (if, indeed, this policy was in fact an asset of the estate). It would, rather, seem to be the duty of the Petitioner as Trustee not to assume that the schedules included all the assets of the bankrupt, but, on the contrary, to be diligent in the effort to discover concealed assets, for which purpose the Bankruptcy Act provides ample machinery, and we find nowhere in the record any remote suggestion that the Trustee exhausted the possibilities in an effort to discover concealed assets. To reverse the judgment of the Court below would, therefore, be equivalent to imposing upon the insurance company the payment of a sum with which the Petitioner may possibly be hereafter surcharged by the Referee in Bankruptcy for his failure to perform the duties assumed by him—the insurance company being guilty of no greater misfeasance than paying its money to the person to whom it had contracted to pay it.

Both in this cause and in the Metropolitan case, *supra*, counsel for the Petitioner appears to proceed upon the theory that the adjudication of a person bankrupt is such notice to the world as imposes upon insurance companies, who may happen years before to have insured the bankrupt's life, the duty of hunting up the Trustee and advising him of the existence of a policy

of insurance upon the life of the bankrupt of which he may not have taken the trouble to learn by his own investigations. In the Metropolitan case the Court of Appeals (and, inferentially, this Court) declined to accede to any such revolutionary doctrine. A moment's consideration will demonstrate the absurdity of such a proposition. It is clear that an involuntary petition in bankruptcy may be filed against an individual in any judicial district in which he may be engaged in business. Residing in Pittsburgh, he may be engaged in the oil business in Oklahoma or may be operating a mine in Idaho, meantime carrying life insurance in a company domiciled in New York. It is equally clear that there would scarcely be the remotest possibility of the insurance company in New York actually learning of a bankruptcy proceeding against one of its policy holders pending in Oklahoma or Idaho. To impose constructive notice of such a proceeding upon the company and to require it to ascertain the name and address of the Trustee and to notify him of the existence of the policy would have this practical effect—that every insurance company before paying the proceeds of the policy to the beneficiary would be obliged to require conclusive proof that no bankruptcy proceeding was pending in any one of the seventy-eight judicial districts of the United States. And, in the very probable event that the searches in some distant district should disclose an adjudication in bankruptcy against a person bearing the same name as the assured, the further duty would be imposed upon the beneficiary of establishing the identity of that bankrupt. Manifestly, the obtaining of such proof would, in very many instances, exhaust the proceeds of the policy.

But even if this Court is willing to go the length of holding that bankruptcy proceedings anywhere are constructive notice to insurance companies everywhere, there is still another and very important consideration to be taken into account. We think it is incontrovertible that a party to a contract may, by appropriate words in the contract itself, reserve to himself the right to *actual* notice (as distinguished from constructive notice) of any change in the obligation which he assumes, either as to the extent of the obligation or the party to whom he is obligated. And that is precisely what the Respondent did in this case. The policy provides that the designated beneficiary may only be changed by the approval in writing of certain designated officers of the Respondent company. Beyond question, such approval of a change of beneficiary could not be unreasonably withheld, if demand were made in the lifetime of the assured. Nevertheless, giving this clause in the policy its very least significance, it amounts to a reservation to the insurance company of a right to *actual* notice of a change of beneficiary before it pays the proceeds of the policy to the beneficiary named in the policy, to whom it is liable in the absence of notice of a superior claim to the fund. Admittedly, no such notice of a superior claim was received by the Respondent in this cause until approximately a year after it had paid the face of the policy to the widow.

The utmost authority which the Federal Courts have ever conceded to a Trustee in Bankruptcy, is in investing him with all the rights exercisable by the bankrupt and also all the rights which might be exer-

cised by a judgment creditor whose execution has been returned unsatisfied.

In re Gehris-Herbine Company, 188 Federal Reporter, 502.

Judgments are not, in Pennsylvania, liens upon personal property, nor can a debt be taken in execution otherwise than by a writ of attachment execution. Assuming a writ of attachment execution issued by a judgment creditor of Schmidt and served on the insurance company a year after it had paid out the only fund in its hands to the person to whom it was contractually liable, without notice of any adverse claim, what could such a judgment creditor expect to obtain beyond an opportunity to pay the costs of the proceeding?

Notwithstanding the comment of counsel for the Petitioner in his argument, we again suggest the question put to the Court below. Assuming that on May 7th, 1913, the Respondent, being without notice of any adverse claim and ignorant of the bankruptcy proceeding against the assured, had declined to pay to Mrs. Schmidt the amount due her under the terms of the policy, and she had, forthwith, commenced an action for the recovery of the face of the policy, what conceivable defense could have been interposed by the Respondent?

We respectfully submit that, both upon principle and authority, the judgment of the court below should be affirmed.

Respectfully submitted,

GEORGE SUTHERLAND,

Attorney for Respondent.